

How common are the common EU standards?

Swedish asylum legislation from a European perspective

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EU Member States are bound by common rules and standards for the protection and reception of asylum seekers, yet they enjoy a certain degree of discretion in interpreting and implementing these rules in their national legislation. In addition to EU law, Member States must comply with the European Convention on Human Rights (ECHR), which also affects national policy. Thus, every EU country must adapt its national regulations, traditions, and administrative systems to these common EU and ECHR standards. This study closely examines Swedish asylum legislation from a European perspective. For those in need of protection, is Sweden more or less generous in comparison to the EU's minimum rules?

Introduction

This study examines Swedish asylum legislation from a European perspective. Although EU Member States are bound by common rules and standards for the protection and reception of asylum seekers, States enjoy a certain degree of discretion when interpreting and implementing these rules in their national legislation. The report focuses on the grounds for protection, residence permits, and family reunification, and analyses the way in which

the Swedish legislator and national legislators in other Member States have used the discretion allowed by EU law and the European Convention on Human Rights. The study also analyses how Sweden's asylum rules deviate from the minimum rules imposed by EU law and international law. To better understand these deviations and to place them in perspective, the study looks at additional EU countries, in particular Denmark, Germany, and Greece. By comparing relevant asylum rules in different EU countries, this study seeks to offer a solid and up-to-date account on Swedish legislation on asylum and contribute to the debate on how the future of Swedish migration policy could and should be redesigned to align with international standards.

Method

Placing Swedish asylum legislation within a broader European perspective entails an analysis of relevant national legislation in order to assess its compliance with EU and international law. This also allows for a comparison of Swedish legislation and the national legislation of other selected EU countries, namely Denmark, Germany and Greece. This analysis aims to provide a better understanding of a) whether Sweden is in compliance with its obligations under EU and international law, and b) how far EU Member States can go in exercising discretion when they implement the common EU rules on asylum at a national level.

The study focuses on five issues: i) grounds on the basis of which protection is provided, ii) types of residence permits granted when the first asylum decision is made, iii) extension of residence permits, iv) possibilities for permanent residence permits, and v) family reunification. The study concludes that the way in which Sweden regulates matters pertaining to these five aspects of asylum does not go beyond the discretion permitted by EU law and the European Convention on Human Rights. Thus, Sweden, in principle, complies with its commitments, as required by EU law and the European Convention on Human Rights. There are, however, two limitations to this finding: the first is that the Common European Asylum System and European Convention on Human Rights contain rules that are both vague and unclear. Because of this, it is impossible to make a definitive and final assessment that the Swedish – or indeed other national – legislation cannot be, under any circumstances when applied to concrete cases, in violation of human rights law. Respect for human rights can only be assessed in light of

the specific circumstances in every individual case where the legislation is applied. In regards to the second limitation: considering that EU rules allow Member States to make different legislative choices on how to treat asylum-seekers, the comparative analysis performed in the study shows that Sweden has the possibility to develop its legislation in ways that imply less risks for potential human rights law violations.

How common are the common EU standards?

A close examination of asylum rules in the countries that this study focuses on reveals clear differences in how the common EU asylum standards are interpreted and implemented in national systems. Denmark's asylum legislation is in many respects more restrictive compared to other EU countries. As it does not fully participate in the Common European Asylum System, Denmark is not bound by the same rules applicable in other countries. Germany and Greece are two countries that, despite being bound by the same EU rules on asylum, have used the discretion allowed by EU law differently, in a way that responds to their distinct interests, capacities, and asylum requirements. Take on the one hand Germany, a country that shares similarities with Sweden in, for instance, having received a large number of asylum-seekers during the 2015-16 refugee crisis. Germany has a fairly sophisticated legal framework in place, and in some cases, similarly to Sweden, has adopted more favourable standards than what is required by EU legislation. On the other hand, Greece is a frontline Member State (i.e., a country located at the EU's external borders) whose asylum system has been repeatedly criticized from a human rights perspective. However, a comparison with Sweden is worth undertaking, not least because some aspects of Swedish asylum policy seem to have been taking a similar restrictive turn, as identified in the study.

The comparison of Swedish legislation with legislation in other EU Member States shows that there are differences and similarities in the interpretation and application of relevant EU rules. These similarities are due to the fact that national legislation is influenced by EU law. The main similarities identified in this study include how countries have regulated the conditions for receiving protection as a refugee and as a subsidiary protection beneficiary, as well as the conditions for family reunification for refugees. In contrast, the study identifies differences regarding the following:

- Conditions for receiving protection for other protection categories besides refugees and beneficiaries of subsidiary protection; more specifically, these other protection categories pertain to humanitarian protection or protection due to particularly distressing circumstances.
- Length of time for residence permits applied to beneficiaries of the various categories of protection.
- The procedure for the cessation of protection status relating to all protection categories (refugees, beneficiaries of subsidiary protection and other forms of humanitarian protection) which could affect a) the extension of residence permits, b) the requirements for obtaining permanent residence permits for all protection categories, and c) the conditions for family reunification for people granted subsidiary or humanitarian protection.

National legislation varies when it comes to the applicable conditions for obtaining a residence permit. The table below shows how countries have conditioned access to permanent residence permits:

Table 1 Conditions for permanent residence permits

	Timing of the application	Time period	Maintenance requirements	Lifestyle	Language and knowledge of society
Sweden	in connection with an application for residence permit extension	after at least 3 years	yes, but possibility for exemptions due to special reasons	yes	no
Denmark	indeterminate	after at least 8 years	yes	yes	yes
Germany	indeterminate	after at least 3 years for refugees and 5 years for those eligible for subsidiary protection	yes	yes	yes
Greece (no permanent residence permits granted, but long-term residence instead)	indeterminate	after at least 5 years	yes	yes	yes

How does Swedish legislation look in comparison to other EU countries?

Sweden has adopted rules that are, in certain respects, more beneficial from the perspective of those in need of protection. These, for instance, include the requirements for the cessation of refugee status. According to the Swedish Aliens Act, solely “changed conditions in the home country” can lead to the cessation of refugee status. More general changes in the circumstances that led to the person being granted refugee status cannot lead to cessation. Another example concerns the conditions for being granted a permanent residence permit. Given that five years of residency is the average standard within the EU (see the EU Directive on the status of non-EU nationals who are long-term residents), Sweden instead requires only three years of residency for a migrant to be eligible for a permanent residence permit. Another example concerns the possibility for family reunification. Swedish legislation is more favourable than the minimum standards required by EU law, offering the possibility to those granted subsidiary protection to reunite with their core family members under the same conditions as refugees.

In other respects, however, Swedish legislation is less favourable in comparison to other EU Member States. For example, Sweden has stricter rules pertaining to the length of residence permits granted when the first decision on asylum is made. Even though Sweden's national rules comply with the EU's minimum rules, there are several EU countries that have decided to provide refugees and those granted subsidiary protection with initial permits valid for a longer period.

Policy recommendations

The starting point for this study has been to investigate the differences and similarities between, on the one hand, the minimum rules required by EU and international law, and on the other hand the standards that Swedish legislation maintains. This study also examines how Sweden and some other EU countries have used the discretion allowed by EU and international law when it comes to the issue of asylum.

Based on the analysis and the results, the following recommendations are relevant to consider:

1. **The stricter the rules and the narrower they are interpreted, the greater the risk that they are incompatible with human rights law.** Sweden generally complies with the standards imposed by EU law and the European Convention on Human Rights. Both, however, require that national legislation allows for flexible rules that take into consideration specific circumstances of each individual case. It is positive that Sweden has such flexible rules. It should be noted, however, that flexibility may be also problematic. Interpretation of flexible rules is based on individual circumstances in every case, which can lead to a certain amount of unpredictability. This, however, is something that is difficult to avoid from the perspective of human rights law that in fact requires a focus on every individual and the specificities of individual circumstances. The stricter the rules are and the narrower they are interpreted, the greater the risk that they might be assessed as incompatible with human rights law (such as the right not to be subjected to *refoulement* or the right to family life).
2. **Sweden should continue to consider humanitarian grounds for protection relating to particularly distressing circumstances (synnerligen ömmande omständigheter), especially distressing circumstances (särskilt ömmande omständigheter), as well as protection due to impediment(s) to enforcement (skydd på grund av verkställighetshinder).** Humanitarian protection (that is to say: particularly distressing circumstances and especially distressing circumstances) and protection due to impediment(s) to enforcement can be difficult to interpret and predict. Sweden should, however, continue to have these grounds for protection in its national legislation to ensure that it fulfils its international obligations. When national authorities (for example the Swedish

Migration Agency and Migration Courts) use these grounds for protection, the case law from the European Court of Human Rights and the European Court of Justice must be taken into careful consideration.

3. **Sweden should retain its rules on the cessation of refugee status. The cessation of refugee status is crucial considering that the majority of people in need of protection are currently granted temporary residence permits.** When these permits expire, the question of cessation can arise. Sweden must comply with its international obligations under the UN Refugee Convention that regulates, in an exhaustive manner, when a refugee status can be ceased. According to the UN Refugee Convention, when circumstances in connection with which a person has been recognised as a refugee have ceased to exist, the refugee status can be ceased. EU law also refers to similar circumstances. EU case law, however, has interpreted these circumstances in a narrow manner, meaning that it suffices if a person is no longer at risk of persecution, for his or her status to cease. Hence, questions as to whether a person can access protection more broadly in his or her home country may be seen as irrelevant when it comes to the decision of cessation of refugee status. This interpretation could possibly be contrary to the UN Refugee Convention. According to the Swedish Aliens Act only 'changed circumstances in the home country can lead to the cessation of a refugee status, rather than general changes in the circumstances that led to the person being recognised as a refugee. An example of circumstances that are not related to the circumstances in one's home country is when a person reaches the age of 18, and their status might be ceased as they were granted protection because they were a minor at the time. This change, however, pertaining to individual circumstances (i.e., becoming 18 years old), does not relate to changes in the country of origin. As a result, Swedish legislation is more advantageous when compared to the EU's minimum rules. Sweden should continue to deviate from the EU's minimum rules in this case, as the minimum rules might not comply with the UN Refugee Convention.
4. **National courts should provide guidance on when the need for protection should be re-examined and the Swedish legislator should regulate this issue.** The cessation of protection granted to refugees and those eligible for subsidiary protection, on the one hand, and the extension of residence permits, on the other hand, are linked to one another and affect one another. If a person's protection status ceases, an extension of

his or her residence permit can be denied, which means that the person will not have a legal basis to stay in the country. The existing Swedish legislation does not specifically regulate the relationship between the rules for cessation of protection status and the question of extension of residence permits. This entails great uncertainties regarding the person's migration status if protection ceases. There is also a lack of specific legal routes to ensure that individuals are eligible to a migration status not based on the need for protection. According to the Swedish Migration Agency's legal position regarding the extension of residence permits, the Agency generally does not re-examine if the need for protection remains when individuals apply for an extension to their residence permit. This makes it less likely that there is a need for other legal routes to obtain a permit that is not based on the need of protection. This legal position is, however, not a source of law. Our recommendation is therefore that national courts should provide guidance on when a re-examination of protection needs should be initiated. In addition, the legislator should regulate the process of how an application for extension should be carried out. Thus, the regulation of the extension process itself and how that examination should be carried out is necessary.

5. **Swedish law should clarify whether residence permits granted due to particularly or especially distressing circumstances should be re-examined when individuals apply for an extension of their permits.** Unlike refugee status and subsidiary protection status, Sweden has no specific rules in the Aliens Act on the cessation of protection granted on the basis of particularly or especially distressing circumstances. A question that must be clarified for the future is if the Swedish Migration Agency should re-examine whether the relevant circumstances continue to persist every time a person, who has received a residence permit due to particularly or especially distressing circumstance, applies for a permit extension.
6. **Swedish law should clarify if the continued need for protection is a requirement demanded for obtaining a permanent residence permit.** A person must apply for an extension of his or her residence permit before, or together with, his or her application for a permanent residence permit. It would be preferable if the law clarifies whether a person can be granted a permanent residence permit even if his or her application for extension is not based on protection needs. The application for

extension can be based on work or to family life. For example, if a person has had a three-year long residence permit based on protection that is subsequently revoked (due to, for example, cessation), but another basis for residence permit exists (e.g., family reasons), then this circumstance should be able to form the basis for being granted a permanent residence permit.

7. **Sweden should retain its flexible rules for the obtainment of permanent residence permits.** It is important that the rules regarding conditions for being granted permanent residence permits in Sweden are designed in a way that allows flexibility, including the requirements for maintenance and lifestyle. Flexible rules mean that the provision of permanent residence is dependent on individual circumstances and special individual cases are duly considered. This can, in turn, simplify access to permanent residence permits, if need be, in specific individual cases. It is not beneficial for individuals or for the host society to have people residing in Sweden for a long time with temporary permits, as temporary permits cause uncertainty for everyone involved.
8. **Sweden should retain its flexible rules that permit, in some cases, exceptions to the maintenance requirement for approving family reunification.** Such flexibility is required by both EU law and international human rights law.
9. **Sweden should offer temporary protection to non-Ukrainian citizens who resided legally in Ukraine.** It is recommended, in accordance with the Council's decision and the European Commission's guidelines, that Sweden offer non-Ukrainian citizens who resided legally in Ukraine (permanently or temporarily), temporary protection. Referring these people to ordinary asylum procedures risks increasing waiting times and puts pressure on an already strained asylum- and reception system which could potentially give rise to human rights violations. In addition, in order to facilitate access to protection in a safe and administratively easier manner, Sweden should consider providing humanitarian visas to those fleeing the war in Ukraine.
10. **Sweden should prepare and adopt a concrete plan which covers all possible situations that may occur when temporary protection under the Temporary Protection Directive is terminated.** Based on lessons learned from countries that have provided temporary protection in the past,

offering temporary protection may be a good and necessary immediate response. Yet it is not sustainable in the long run and should not last longer than absolutely necessary. In order to avoid situations in which those granted temporary protection find themselves in limbo after this protection ceases, it is necessary that rules regarding possibilities to extend their lawful stay in Sweden are considered well in advance. This consideration should include a careful and informed analysis of the following questions a) how the Swedish Migration Agency's lifting of the current decision to suspend examination of refugee status will relate to the actual examination of status later, and what the basis for a "permit after temporary protection" entails, b) how Sweden could facilitate the extension of these persons' stay through other types of residence permits (for example through a work permit), and c) how Sweden can contribute to their integration into Swedish society, which is central in a long-term plan. The latter consideration should be based on reports from civil society and on further research as to how those who wish to return home can do so in a safe and humane manner, what kind of help they may receive, and whether resettlement support can be utilized.

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